

TO BE ARGUED BY:  
DAVID D. JENSEN, ESQ.  
*15 minutes requested*

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*Supreme Court of the State of New York  
Appellate Division: Second Department*

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APPELLATE DIVISION DOCKET NO. XXXXX-2020

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In the matter of

ANDREW GOODMAN FOUNDATION,  
ELECTION@BARD, SADIA SABA, ERIN CANNAN,  
and LEO BOTSTEIN,

*Petitioners-Appellees,*

-against-

DUTCHESS COUNTY BOARD OF ELECTIONS,  
ERIK J. HAIGHT, in his official capacity, and  
ELIZABETH J. SOTO, in her official capacity,

*Respondents-Appellants.*

Dutchess County Index No. 2020/52737

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**BRIEF FOR RESPONDENT-APPELLANT ERIK J. HAIGHT**

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## QUESTIONS PRESENTED

This appeal presents three questions:

First, did the court below err when it granted relief on the basis of considerations that were not before the Dutchess County Board of Elections when it designated polling places on March 13, 2020?

Second, did the court below err when it reviewed a discretionary action that was not final because the Dutchess County Board of Elections had neither taken nor resolved not to take action?

Third, did the court below abuse its discretion when it ordered the Dutchess County Board of Elections to change a polling place 11 days before an election, where retaining the lawfully designated polling place would not have prevented anyone from voting?

## **STATEMENT OF THE NATURE OF THE CASE AND THE PERTINENT FACTS**

This is an Article 78 proceeding that challenges a polling place designation by Respondent Dutchess County Board of Elections (the “Board”). Petitioners seek an order directing the Board to change a polling place from its designated location—St. John’s Episcopal Church in Barrytown, New York—to one on the campus of Bard College.

(Appx15) On October 14, 2020, the Supreme Court issued a Decision and Order that denied relief to Petitioners. (Appx110-11) On Friday, October 23, 2020, at approximately 6:00 p.m., the Supreme Court granted Petitioners’ motion to renew and ordered Respondents to move the polling place to a location on Bard’s campus “in time for in-person voting on November 3, 2020.” (Appx146).

Section 4-104 of the Election Law governs the designation of polling places. Pertinently, it provides that local boards of elections “shall, in consultation with each city, town and village, designate the polling places in each election district.” Election Law § 4-104(1).

Furthermore, “polling places must be designated by March fifteenth, of each year, and shall be effective for one year thereafter.” *Id.*

Accordingly, the Board issued a resolution that designated the polling places for Dutchess County on Friday, March 13, 2020. (Appx61-67)

That resolution designated St. John's Episcopal Church in Barrytown, New York as the polling place for Election District 5 in Red Hook, New York. (Appx65) This location has served as the polling place for this election district since at least 2011. (Appx58) There are 1,035 voters in this election district. (Appx49) The election district's area is between about 5.3 to 5.5 miles from north to south and 1.4 to 1.7 miles from east to west. (Appx52)

Of the 1,035 registered voters in the election district, 670 (65%) have addresses on Bard's campus, while 365 (35%) live elsewhere. (Appx49) The longstanding polling place, St. John's Episcopal Church, is located about 0.3 mile south of Bard's property. (Appx55) During elections, Bard provides a shuttle to its students that takes them from a location on its campus to the polling place. (Appx19) If the polling place is changed from St. John's Episcopal Church to the location Petitioners prefer, some voters in the election district will have to travel further than they currently do. (Appx57)

The only agency action that the Verified Petition identifies is the Board's March 13, 2020 designation of polling places. (Appx6) The Verified Petition does not identify any other decision or act by the Board.

The Verified Petition identifies two ways in which they provided information to the Board at the time of the March 2020 decision. First, the Verified Petition includes as an exhibit a letter that two Petitioners sent to the Board on February 28, 2020. (Appx38-39) This letter provided three considerations that, in the Petitioners' view, would support a polling place on Bard's campus:

- 1) allow pedestrian accessibility that is currently lacking (no sidewalks and poor street lighting near the current location for the voting district),
- 2) provide access to the designated location via a public transit route, and
- 3) ensure that voters are not disenfranchised and deprived of their state and federal rights to participate in the election process.

(Appx38) Aside from this letter, the only way in which the Verified Petition reflects any request to or communication with the Board is with the generalized and non-specific statement that "Petitioners have long and repeatedly requested that the Dutchess County Board of Elections ('Dutchess BOE') designate Bard's Bertelsmann Campus



Center (the ‘Bard location’) in lieu of or in addition to the Church as a polling place.” (Appx3)

In seeking relief, Petitioners relied primarily on five declarations that individuals had executed in September 2020, just prior to filing this action. (Appx18-36) None of those declarations identified any information that had been before the Board at the time of its March 2020 decision. (See Appx18-36) Furthermore, none of the declarations asserted that any information or request had been provided to the Board since March 2020. (See Appx18-36) Rather, one Bard student and two Bard administrators testified, in substance, that it would be more convenient to vote if the polling place were on campus. (See Appx18-29) One Bard administrator testified that she had inspected St. John’s Episcopal Church on September 2, 2020 and had formed the opinion that it was, at that time, out of compliance with the Americans with Disabilities Act. (See Appx30-33) Finally, a Bard professor identified herself as an expert and opined that because St. John’s Church is “estimated at 500 square feet,” while “the larger space available at Bard” is “estimated at 1500 square feet,” she had determined that there is a 4 times greater risk of transmission at St. John’s Church. (See

Appx34-36). She said this conclusion was “[b]ased solely on the sizes of the two facilities, and given the specific characteristics of the virus that causes covid-19.” (Appx35) St. John’s Episcopal Church is actually 731.5 square feet. (Appx58)

Section 4-104 provides that boards of election have “discretion” to find that a designated polling place is “unsuitable or unsafe,” and if so, “then the board of elections is empowered to select an alternative meeting place.” Election Law § 4-104(1). The Verified Petition does not cite this language, and it does not assert that the Board of Elections should have subsequently found that St. John’s Episcopal Church had become unsuitable or unsafe. (See Appx1-15) It does not, for example, allege that the Petitioners had contacted the Board to suggest that they change the polling place at any point after February 28, 2020. (See Appx1-15) Notably, over the summer the Board changed several other designated polling places in light of COVID-19 concerns. (Appx59)

Prior to the filing of this proceeding, Commissioner Haight was unaware of any request to make changes to the polling place at issue here because of COVID-19. (Appx58) However, after reviewing Petitioners’ moving papers in the court below, which raised the issue,

Respondent contacted Anil Vaidan, MD MPH, who is the Commissioner of Behavioral and Community Health for Dutchess County. (Appx59) Dr. Vaidan advised Respondent that “having a poll location on Bard College campus may increase the potential for community transmission of COVID-19.” (Appx59, Appx82) Among other issues, Dr. Vaidan pointed out that COVID-19 infections are surging among college populations, many of whom are asymptomatic. (Appx59, Appx82) Respondent provided this information to the Court with the strenuous caveat that these considerations were irrelevant to the designation made on March 13, 2020, which was the only relevant issue in the proceeding.

When Petitioners filed their *reply* brief on September 25, 2020, they included a copy of a letter they had purportedly sent to Respondent on August 25, 2020, *i.e.* 10 days before they filed this action. (Appx85-88) In that letter, Petitioners had requested that the Board change the polling place to Bard’s campus and listed six considerations that, in their view, would support the change. (*See* Appx85-87) Significantly, the letter made only oblique references to the COVID-19 pandemic. Specifically, the letter indicated that Bard would “have to operate the

shuttle to the Church at a reduced capacity due to COVID-19 social distancing guidelines,” that Bard’s Student Center was larger and would “accommodate much longer lines of socially-distanced people,” and that “the Student Center presently is fully operational . . . consistent with all . . . recognized public health guidance pertinent to the pandemic.” (Appx85-87) There was no evidence that the Board had made any decision, final or otherwise, with respect to this letter.

On October 14, 2020, the Supreme Court issued a Decision and Order that denied relief to Petitioners. (Appx102-03) The court declined to consider Petitioners’ claims that the polling place did not comply with the ADA and that COVID-19 made the polling place unsafe because “[t]he Court can only adjudicate the controversies lawfully before it.” (Appx102) The court explained that Petitioners’ “Article 78 proceeding . . . challeng[ed] respondents’ March 13, 2020 polling place designation. Petitioners did not file a declaratory judgment action or articulate a theory in this Article 78 proceeding proving grounds upon which the Court could direct the Board of Elections to take any specific action based on the COVID-19 pandemic.” (Appx102)

As to the March 13, 2020 decision, the court found “that the selection of the St. John’s Episcopal Church, which has been used as a polling place for many years, is not so arbitrary, unreasonable or capricious as to compel a conclusion that Respondents have abused their discretion in selecting it. Nor have the Petitioners submitted evidence that the location of the polling place is so inconvenient or unsuitable as to impede or restrain any eligible voter from casting a ballot.” (Appx102) The Court concluded that “Petitioners have failed to establish that the decision to retain the Episcopal Church as a polling place served to disenfranchise voters or was arbitrary and capricious, an abuse of law or an abuse of discretion.” (Appx102)

Finally, the court observed that it “has the authority to convert an Article 78 proceeding to a plenary action, [but] it decline[d] to do so here based [on] the timing of petitioners’ commencement of this proceeding and the procedural posture. The November 3, 2020 election is 21 days away.” (Appx102)

Shortly after the court issued its decision, the Board changed a different polling place in Dutchess County, and Petitioners moved to reargue or renew. (Appx112-24) At approximately 6:00 p.m. on Friday,

October 23, 2020, the court granted the motion to renew and ordered that “[t]he District 5 polling place shall be moved from the St. John’s Episcopal Church in Red Hook, N.Y. to the Bertelsmann Campus Center at Bard College[.]” (Appx138) The court recited that Respondent had “submitted an affidavit stating that the election was too close in time to enable a change in the polling site that would be fair to all voters.” (Appx137) The court stated that “[a]s stated in the decision and order, it was largely on this basis that the court found that the determination not to move the polling place was based in reason and not arbitrary and capricious or an abuse of discretion.” (Appx137) The court concluded that “[t]he basis for this court’s decision and order has now been eliminated since the primary factor identified by Commissioner Haight and relied upon by this court was simply untrue.” (Appx138)

Significantly, the Department of Health requires colleges and universities to develop and submit plans for reopening and operating their campuses before *See New York State Department of Health, Interim Guidance for Higher Education During the COVID-19 Public Health Emergency at p. 1 (Jun. 28, 2020), available at*

[https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/Higher\\_Education\\_Detailed\\_Guidelines.pdf](https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/Higher_Education_Detailed_Guidelines.pdf) (last visited Oct. 26, 2020).

These plans address (among other things) how to address visitors to campus. In addition, the Election Law requires the Board to complete an access survey “for every polling site . . . *prior* to its designation.”

Election Law § 4-104(1-b) (emphasis added). Yesterday (Sunday),

Respondent Commissioner Haight drove past the “closed” signs that surround Bard’s campus and attempted to inspect the Student Center as a polling place. Security forced him to leave campus, notwithstanding his attempt to explain that he was from the Board and was attempting to inspect a polling place.

## ARGUMENT

The court below was correct when it ruled, on October 14, 2020, that the Petitioners' claims about COVID-19 were not before the court because they were not before the Board at the time it designated polling places. The court below was also correct when it ruled, in that same decision and order, that Petitioners had not articulated a claim or theory under which Article 78 relief would be available to direct the Board to take action by changing the polling place. Both of these rulings rested on firmly established principles of agency review. Specifically, judicial review of agency decisions looks only to the considerations that were before the agency at the time of its decision. And, review in the form of certiorari or mandamus to review is only available where there has been a final determination. No material consideration changed between October 14, 2020, when the court below rejected Petitioners' claim on its merits, and October 23, 2020, when the court modified its prior ruling to order unprecedented relief—that the Board change the polling place to a specified new location.

Moreover, even if Petitioners were entitled to relief on the merits, it was a manifest abuse of discretion to order a polling place change 11



days before the date of a scheduled election. Changing the status quo by ordering this relief would only be appropriate if the designated polling place was actually unavailable. Petitioners' claim that their preferred polling place would be "better" was no justification for changing the status quo in this manner, particularly where the Petitioners had waited until September to bring their claims.

**I) The Court Erred in Granting Relief on the Basis of Considerations that were Not Before the Board of Elections at the Time of the Polling Place Designation**

It is well established that a court reviewing an agency's determination "must judge the propriety of such action solely by the grounds invoked by the agency." *Montauk Improvement, Inc. v. Proccacino*, 41 N.Y.2d 913, 913, 394 N.Y.S.2d 619 (1977) (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)) (other citation omitted); accord *Scherbyn v. Boces*, 77 N.Y.2d 753, 758, 570 N.Y.S.2d 474 (1991). This means that a court cannot consider grounds that are raised *after* the agency's decision, such as grounds that are raised for the first time in pleadings. See *Scherbyn*, 77 N.Y.2d at 759. "Judicial review of an administrative determination is limited to the ground invoked by the administrative body at the time of the decision." *Tamulinas v. Bd. of*

*Educ.*, 279 A.D.2d 527, 529, 719 N.Y.S.2d 660 (2d Dep’t 2001) (*citing Scherbyn*, 77 N.Y.2d at 758-59).

The case at bar is an Article 78 proceeding that challenges the polling place designation that the Board of Elections made on March 13, 2020. The Verified Petition does not identify any other agency determination that is at issue.

However, when the court below granted Petitioners’ motion to renew and then granted relief, it cited to “the affidavit of Felicia Keesing, a professor with expertise in the transmission of infectious diseases stating that the proposed polling place at Bard College is a safer option based upon the smaller size and layout of St. John’s Episcopal Church.” (Appx137) That affidavit (declaration) was executed on September 4, 2020, months *after* the March 13, 2020 decision that was actually at issue. (Appx36) The considerations in this declaration were never before the Board until Petitioners filed this action, making it self-evident that the Board did not abuse its discretion in failing to consider them. Notable, furthermore, is that the court below wholly ignored the input provided by the Dutchess County Health Commissioner when it tacitly chose to give more weight to the

testimony of the Bard professor. But, of course, “the court’s role is not to consider whether there was a better alternative, to weigh alternative actions, to resolve disputes among the parties’ experts, or to enforce its own judgment about the [ultimate question], but to determine whether the agency followed the mandated procedure and its determination was not arbitrary, an abuse of discretion, or affected by an error of law.”

*Ordonez v. City of New York*, 60 Misc. 3d 1213(A), 110 N.Y.S.3d 222 (Supr. Ct., New York Co. 2018) (citing *Kellner v. City of New York Dep’t of Sanitation*, 107 A.D.3d 529, 529-30 (1st Dep’t 2013)).

The court below erred when it relied on evidence from September 2020 to conclude that that the Board was arbitrary and capricious when it issued its polling place designations on March 13, 2020.

## **II) The Court Erred Because there was No Final Determination to Review**

Article 78 codifies, and replaces, the common law writs of mandamus, prohibition and certiorari. *See* CPLR § 7801; *New York City Health & Hospitals Corp. v. McBarnette*, 84 N.Y.2d 194, 204, 616 N.Y.S.2d 1 (1994); *De Milio v. Borghard*, 55 N.Y.2d 216, 219, 448 N.Y.S.2d 441 (1982). While Petitioner’s claims concern the Election Law, the Election Law confers no inherent authority to hear Election

Law matters. *See Lisa v. Bd. of Elections*, 54 A.D.2d 746, 746-47, 387 N.Y.S.2d 876 (2d Dep’t 1976) (citations omitted). Thus, because no provision of the Election Law creates a cause of action to challenge polling place determinations, Article 78 is the only means of relief available to Petitioner—to the extent relief is available at all.

As we explain, no Article 78 relief is available on the facts presented here because, first, the decision to change a designated polling place is a discretionary one, and second, the Board has not made any determination, let alone a final determination, about changing the polling place for Election District 5.

The only form of Article 78 relief that is pertinent here is mandamus to review. Prohibition does not apply because this form of relief is available only when a “body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction.” CPLR § 7803(2). No one contends that the Board lacks jurisdiction to designate and change polling places. And, review in the form of mandamus does not apply because this form of review is available only where “the duty sought to be enjoined is performance of an act commanded to be performed by law and involving no exercise of discretion.” *Hamptons*

*Hospital & Medical Center, Inc. v. Moore*, 52 N.Y.2d 88, 96, 436 N.Y.S.2d 239 (1981); *see also De Milio v. Borghard*, 55 N.Y.2d 216, 220, 448 N.Y.S.2d 441 (1982) (“the aggrievement does not arise from the final determination but from the refusal of the body or officer to act or to perform a duty enjoined by law” (quotation omitted)). Obviously, the selection of polling places is a function that inherently involves the exercise of discretion. And finally, certiorari is unavailable because there is no requirement of a quasi-judicial hearing before a board of elections designates polling places, nor before it changes a designated polling place. *See Scherbyn*, 77 N.Y.2d at 757.

The issue in a mandamus to review proceeding is “whether the agency determination was arbitrary and capricious or affected by an error of law.” *Id.* at 758 (citations omitted). However, mandamus to review (like certiorari) is available only where an agency has made a “final determination.” *See Hamptons Hospital*, 52 N.Y.2d 88 at 96. The Board of Elections has not made any determination, let alone a final determination, about Petitioners’ contention that it should change the polling place for Election District 5 because of COVID-19 concerns. The Board has not, for example, opened a discussion about whether it

should change the polling place because of COVID-19, and then reached a final determination (or any determination) that it should not. The Verified Petition does not, for example, contend that the Petitioners demanded a polling place change due to COVID-19 concerns, but were rebuffed.

Concededly, the Board's designation of polling places on March 13, 2020 is subject to review under the mandamus to review framework. *See Koepfel v. Southard*, 30 Misc. 2d 463, 464 (Supr. Ct., Nassau Co. 1961). And, if the Board were to then alter the status quo by changing a designated polling place, that determination would also be subject to review. *See Krowe v. Westchester Co. Bd. of Elections*, 155 A.D.3d 672, 673, 873 N.Y.S.2d 319 (2d Dep't 2017). But the situation here is markedly different. Here, the Verified Petition does not assert that the Board should consider using its discretionary power to change polling places to change the polling place for Election District 5. Nor does the Verified Petition identify any determination, let alone a final determination, about the matter. There is simply no final determination to review. *See Hamptons Hospital*, 52 N.Y.2d 88 at 96.

Because there has been no final determination, there is no mandamus to review whether that final determination was arbitrary and capricious.

### **III) The Court Below Abused its Discretion in Ordering a Polling Place Change 11 Days Before the Election**

Even if Petitioners had been entitled to relief, the relief that the court below ordered—to *change* the lawfully designated polling place 11 days before an election—was a manifest abuse of discretion, given that nothing indicated that people would be unable to vote if St. John’s Episcopal Church remained the polling place. In order to grant relief, the court needed to address the balance of equities, which must support the grant of an injunction for relief to issue. *See Elow v. Svenningsen*, 58 A.D.3d 674, 675, 873 N.Y.S.2d 319 (2d Dep’t 2009). This required the court to consider “exactly what practicalities and procedures would be entailed if the relief sought were granted.” *Corso v. Albany Co. Bd. of Elections*, 90 A.D.2d 637, 638 (3d Dep’t), *aff’d*, 57 N.Y.2d 950 (1982). In the absence of such detailed information, inaction may be preferable “where the existing polling places are located relatively close” and it appears that “no voter will be disenfranchised if the relief sought herein is not granted.” *Id.*

In *Krowe v. Westchester County Board of Elections*, this Court ruled that a board of elections had abused its discretion when it had decided “to relocate the polling place less than three weeks before the election based only on a general advisement by an unnamed Town official that construction would be performed at the Town Hall on the day of the election.” *Krowe*, 155 A.D.3d at 673. There, as here, “irreparable harm would result if the polling place were relocated, particularly at this late date.” *Id.*

Similar too is *Koepfel v. Southard*, where the supreme court ruled that designating a “firehouse, which has been used as a polling place for a great many years and which has parking and other facilities, is not so arbitrary, unreasonable or capricious as to compel a conclusion that the commissioners have been guilty of an abuse of discretion in selecting it, nor is there any evidence, as distinguished from argument, that the location of the polling place is so inconvenient or unsuitable as to have impeded or restrained any eligible voter from casting his ballot.” *Koepfel*, 30 Misc. 2d at 464. This is also the case here.

The court below abused its discretion when it ordered the Board to change the polling place 11 days before the date of a national election



where the undisputed evidence was that the current, lawfully designated polling place would not prevent anyone from voting. While it would presumably be permissible to change a polling place 11 days before an election if the polling place had actually become unavailable—for example, if a tornado had inflicted substantial damage—it was an abuse of discretion to order a new polling place on such short notice where the essential gravamen of Petitioners’ claims is that another polling place would be “better.” This is bolstered by the Election Law’s requirement that the Board inspect and approve polling places prior to designating them, as well as by the fact that Department of Health regulations appear to require Bard to update its reopening plans to address the proposed new use of its campus. In the absence of a true emergency situation, the need to take these actions weighs strongly against the last-minute change. Notably, the polling place change made on October 15, 2020 was made 19 days in advance of the election which, while less than ideal, allowed a significantly larger window of time. The change the court ordered after the close of business on a Friday affords at most 11 days—and really, in effect, 8 days, since the first business day after this decision is today.

#### **IV) Conclusion**

The Court should reverse the decision and order of the court below (Appx136-38) that modified its prior decision and order (Appx98-103) by directing the Board to move the polling place.

Dated: 26 October 2020



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## **PRINTING SPECIFICATIONS STATEMENT**

I hereby certify pursuant to 22 NYCRR 1250.8(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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